Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

ALISON LEBER, *et al.*,

Petitioners,

v.

UNIVERSAL MUSIC AND VIDEO DISTRIBUTION, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Illinois Economic Development for a Growing Economy Tax Credit Act (EDGE) provides tax incentives for business growth in Illinois by granting tax credits against Illinois income tax liability to companies creating new full time jobs in Illinois. Universal Music and Video Distribution, Inc., (Universal) and Panasonic Disc Services Corporation (Panasonic) entered into a joint venture to create a new company to manufacture CDs and DVDs. The new company, Matsushita Universal Media Services LLC of America (MUMS) purchased the existing Universal facility at Pinckneyville and transferred its employees, except for employees of the Returns Department, which MUMS did not purchase. Under Universal's 1996 collective bargaining agreement (cba) with Local 352 of the International Leather Goods Plastics Novelty and Service Workers' Union (Local 352), the Returns Department employees with seniority could "bump" employees with lesser seniority. Shortly after the formation of MUMS, the Returns Department at Universal was closed. MUMS offered to hire those employees under its 1999 cba with Local 352, but without their seniority rights. These Returns Department employees were then counted as "New Employees" for purposes of gaining EDGE tax incentives, which passed through to Universal and Panasonic.

The Question Presented is: Did Universal and Panasonic form MUMS as part of a scheme to evade the 1996 cba and gain EDGE tax incentives by hiring laid-off Returns Department employees as "New Employees"?

PARTIES TO THE PROCEEDING

Petitioners Alison Leber, Andrea Woodside, Audrey Young, Angeline Sherman and Barbara Green represent a group of former employees of Universal Music and Video Distribution, Inc., and Local 352 of the International Leather Goods, Plastic, Service & Novelty Workers' Union, AFL-CIO is also a petitioner. The respondents are: Universal Music and Video Distribution, Inc.; Panasonic Disc Services Corporation; Matsushita Universal Media Services LLC of America; International Leather Goods, Plastics, Novelty and Service Workers' Union; Midwest Joint Board of International Leather Goods, Plastics, Novelty and Service Workers Union.

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The opinion of the United States Court of Appeals for the Seventh Circuit, dated June 9, 2003, is unpublished and is attached as Appendix A. The opinion of the United States District Court for the Southern District of Illinois, dated September 24, 2002, is published at 225 F. Supp. 2d 928 and is attached as Appendix B. The Judgment of the United States District Court for the Southern District of Illinois was entered on September 24, 2002, and is attached as Appendix C.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). The jurisdiction of the United States Court of Appeals for the Seventh Circuit was based on 28 U.S.C. § 1291. The jurisdiction of the United States District Court for the Southern District of Illinois was based on § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 185 provides in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

35 ILCS 10/5-5 provides in pertinent part:

"New Employee" means:

(a) A Full-Time Employee first employed by a Taxpayer in the project that is the subject of an Agreement and who is hired after the Taxpayer enters into the tax credit Agreement.

(b) The term "New Employee" does not include:

(1) an employee of the Taxpayer who performs a job that was previously performed by another employee, if that job existed for at least 6 months before hiring the employee;

(2) an employee of the Taxpayer who was previously employed in Illinois by a Related Member of the Taxpayer and whose employment was shifted to the Taxpayer after the Taxpayer entered into the tax credit Agreement;

35 ILCS 10/5-20(b) provides that to qualify for tax credits under the Act, the applicant's project must "involve an investment of at least $5,000,000 in capital investments to be placed in service and to employ at least 25 New Employees within the State as a direct result of the project."

35 ILCS 10/5-35 provides that credits cannot be claimed for any jobs relocated from one site in Illinois to another site in Illinois.

35 ILCS 10/5-60 provides in pertinent part:

> (a) The shareholders or partners of a Taxpayer that is a Pass Through Entity shall be entitled to the Credit allowed under the Agreement.

STATEMENT OF THE CASE

In 1999, Illinois enacted the Economic Development for a Growing Economy Tax Credit Act, 35 ILCS 10/5-3 *et seq.* [A875][1] The Act was part of a campaign promise of Governor George Ryan to send a strong message to the business community that Illinois is a great place to do business, and that economic development and job creation are top priorities in Illinois. [A470] Under the Act, tax credits against Illinois income tax liability would be provided to companies investing at least $5,000,000 in capital improvements and employing at least 25 new employees within Illinois. 35 ILCS 10/5-20. [A883] Credits cannot be claimed for any jobs relocated from one site in Illinois to another site in Illinois. 35 ILCS 10/5-35. [A885] The partners of an entity that is a Pass Through Entity are entitled to the Credit. 35 ILCS 10/5-60. [A892]

A "New Employee" under the Act is a full-time employee first employed by the company who is hired after the company enters into the tax credit agreement. "New Employee" does not include an employee who performs a job that was previously performed by another employee, if that job existed for at least 6 months before hiring the employee, or an employee who was previously employed in Illinois by a

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1. "A" refers to the Appendix of Plaintiffs-Appellants in the United States Court of Appeals for the Seventh Circuit

Related Member and whose employment was shifted to the company after the company entered into the tax credit agreement. 35 ILCS 10/5-5. [A877]

Universal operated a facility in Pinckneyville, Illinois, to manufacture compact discs (CDs). The employees of the facility were members of Local 352, and in 1996, Universal entered into a cba with Local 352. [A165] Section 14.03 of the cba governs Seniority and allows an employee who is about to be laid off to "bump" an employee with lesser seniority. [A181]

In 1998, Universal entered into a joint venture with Panasonic to manufacture CDs and DVDs. The joint venture was MUMS. Local 352 notified the employees that the Pinckneyville facility was being sold to MUMS, except for the Returns Department. [SA221][2] On May 13, 1999, MUMS agreed to hire Universal employees, except for Returns Department employees, under specific conditions consistent with the 1996 cba, including seniority provisions. [A53 to A57] MUMS stated that it was understood that it did not purchase the Returns Department, that Returns employees would not become MUMS employees but would remain Universal employees, and that Returns employees would not have any right to bump into any positions at MUMS. [A54]

MUMS was officially formed on May 22, 1999. On May 23, 1999, MUMS recognized the International as the bargaining representative and signed a cba with Local 352. [A58]

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2. "SA" refers to the Supplemental Appendix of Defendants-Appellees in the United States Court of Appeals for the Seventh Circuit.

In July, 1999, Universal offered incentives to Returns Department employees to stay, and provided for a larger one-time payment for those employees with higher plant seniority. [A872] On August 24, 1999, MUMS Chief Operating Officer, Gary Vaughn, made a Preliminary Application for tax incentives under EDGE, stating that 400 jobs were retained and that 300 new employees would be hired. [A532] On August 24, 1999, Illinois Commerce and Community Affairs informed Mr. Vaughn that as of that date, "any new employees hired by your company prior to the execution of an EDGE agreement are eligible for consideration as new employees, as defined by statute and administrative rule." On October 21, 1999, Illinois Commerce and Community Affairs wrote to Mr. Vaughn and stated that it was their "understanding that this project will result in the creation of approximately 500 new full time jobs and the retention of 400 at the Pinckneyville, Illinois facility."

On September 17, 1999, the Returns Department was closed, eliminating 184 union employees. [SA 222] MUMS and Local 352 entered into a Side Agreement under which the Returns employees would be given a hiring preference at MUMS, but their prior Universal seniority would be credited only for purposes of vacation allowances and preferences. They would not be given "bumping" rights and their service and seniority "for all other purposes shall be the same as for new employees." [A197] COO Vaughn testified that anyone hired after the initial 375 employees transferred on May 23, 1999 was a new employee. [A338: Deposition p. 154 lines 4 to 20] The Returns Department employees hired by MUMS were counted as "New Employees" for purposes of gaining the EDGE tax credits.

Several Returns Department employees filed suit against Universal, Panasonic and MUMS for violating the 1996 cba, pursuant to § 301 of the Labor Management Relations Act, 39 U.S.C. § 185. [A29] On a motion for summary judgment filed by Universal, Panasonic, MUMS and Local 352, the United States District Court for the Southern District of Illinois dismissed the petitioners' claims. [App. C] The Honorable J. Phil Gilbert, U.S.D.J., rejected the petitioners' argument that Universal and Panasonic had formed MUMS for an improper purpose to take advantage of EDGE. Judge Gilbert found that EDGE was designed to influence corporations to create jobs in Illinois and that this was a legitimate consideration for MUMS. [App. B: p. 19 to p. 20] On appeal, the United States Court of Appeals for the Seventh Circuit stated that how much MUMS pays in state taxes or receives in subsidies is between MUMS and the State of Illinois. The Court of Appeals indicated that the meaning and effect of collective bargaining agreements are matters of federal law, and that nothing a State Legislature does with respect to taxes or subsidies enlarges or diminishes any rights under a cba. [App. A: p. 4 to 6]

REASONS FOR GRANTING THE PETITION

Petitioners believe that Universal and Panasonic created MUMS as part of an improper scheme to evade the 1996 Universal cba and get EDGE tax credits by (1) having MUMS purchase the Universal Pinckneyville facility with the exception of the Returns Department, (2) giving incentives to Universal Returns Department employees with seniority under the Universal 1996 cba to remain with the Returns Department, thereby leaving high seniority employees in the Returns Department, (3) closing the Universal Returns Department, (4) having MUMS hire the laid-off Returns

Department employees under the MUMS 1999 cba so that they were without the seniority they earned with Universal, (5) counting those Returns Department employees as "New Employees" for purposes of EDGE tax credits, and (6) obtaining EDGE tax credits to which they were not entitled. It is submitted that this improper scheme impermissibly intruded upon the protected rights of the union employees under the National Labor Relations Act, and constitutes an exceptional issue for review by this Court.

It is also submitted that because many states have similar tax incentives for the creation of new jobs, the issue is one of national importance that should be addressed by this Court. In effect, the district court and the Seventh Circuit held that only federal labor law applies in issues surrounding the formation of collective bargaining agreements and that state law that affects the formation of collective bargaining agreements should be ignored. However, collective bargaining agreements are about hiring workers, and tax incentive programs are about hiring workers. They overlap and are in conflict. If the ruling here is permitted to stand, it could be applied all over the country, and in every state with specific requirements for hiring and retaining "new employees", collective bargaining agreements will be emasculated. Corporate employers will have total control over state incentive programs simply by using federal labor law to manipulate or circumvent the meaning of "new employee" in any given state. The petitioners here are not just workers but are also citizens of the State of Illinois who are entitled to the benefit of laws enacted on their behalf. Corporate employers should not be permitted to utilize state tax incentive laws to evade federal law and interfere with workers' rights under collective bargaining agents.

LEGAL ARGUMENT

THE IMPROPER SCHEME FOSTERED BY UNIVERSAL, PANASONIC AND MUMS INTRUDES ON PROTECTED SENIORITY RIGHTS OF UNIVERSAL'S UNION EMPLOYEES

Under § 301 of the National Labor Relations Act, 29 U.S.C. § 185, federal courts have jurisdiction over controversies involving labor contracts in industries affecting commerce. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957). The thrust of the National Labor Relations Act is not the protection of the union or the employer but the protection of the employee. *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 442 (5th Cir. 1978).

Seniority rights derive their scope and significance from union contracts. *Schick v. NLRB*, 409 F.2d 395 (7th Cir. 1969); *Ingersoll v. Brotherhood of Locomotive Engineers*, 307 F.2d 257 (6th Cir. 1962). Seniority rights are created and limited by collective bargaining agreements. *Slenczka v. Hoover Ball & Bearing Co., Universal Wire Spring Divn.*, 215 F. Supp. 761 (D.C.Ohio 1963).

The seniority rights of employees of the Universal Returns Department were derived from the 1996 Universal cba. This cba gave Universal Returns Department employees bumping rights over employees with lesser seniority. MUMS did not purchase the Universal Returns Department when it purchased the rest of the Universal Pinckneyville facility, and it specifically rejected any bumping rights for the Returns Department. MUMS transferred 375 Universal employees, but left the 184 Universal Returns Department employees

with Universal. Universal then set up incentives for the Returns Department employees to remain, providing a larger financial incentive for those employees with more seniority, leaving the Returns Department with high seniority employees. Universal then closed the Returns Department.

MUMS agreed to hire the laid-off Universal Returns Department employees, but the Returns Department employees would have to give up their seniority, except for vacation allowances and preferences, and they would no longer have bumping rights. The laid-off Universal Returns Department employees who were hired by MUMS were counted as "New Employees" for purposes of EDGE, thereby allowing MUMS, Universal and Panasonic to obtain tax credits. This constitutes an improper scheme to evade the 1996 cba, to eliminate seniority rights for the high-seniority employees of the Universal Returns Department, and at the same time to get tax credits from the State of Illinois to which they are not entitled.

Although the United States District Court for the Southern District of Illinois and the United States Court of Appeals for the Seventh Circuit thought that forming MUMS to take advantage of EDGE tax credits was a legitimate consideration, an improper motive may make unlawful what would otherwise be unassailable conduct. *Limbach Co. v. Sheet Metal Workers International Ass'n., AFL-CIO*, 949 F.2d 1241 (3rd Cir 1991). Furthermore, an antiunion animus may render unlawful conduct of an employer that would otherwise be lawful. *Stokely-Van Camp, Inc. v. NLRB*, 722 F.2d 1324, 1329 (7th Cir. 1983). An employer's action cannot reasonably tend to interfere with or coerce employees in the exercise of their protected rights. *6 West Ltd. Corp. v. NLRB*, 237 F.3d

767, 779 (7th Cir. 2001), citing *Carry Cos of Illinois v. NLRB*, 30 F.3d 934 (7th Cir. 1994), quoting *Weather Shield Mfg., Inc., Millwork Divn. v. NLRB*, 890 F.2d 52, 56 (7th Cir. 1989).

The actions of the defendants here clearly interfered with the exercise of the protected rights of the Universal Returns Department employees and coerced them to give up the seniority they had gained under the 1996 Universal cba. Universal gave the Returns Department employees financial incentives to remain in the Returns Department, and when it was closed, MUMS would only hire them if they gave up their seniority rights. The reason for this was to make Universal Returns Department employees "New Employees" for purposes of obtaining tax credits under EDGE. Universal, Panasonic and MUMS had a right to apply for EDGE tax credits. But they did not have a right to enter into a scheme to evade the 1996 Universal cba and take away the seniority rights of the Returns Department employees in order to get those EDGE tax credits. This scheme constitutes an improper motive and an antiunion animus that negates the legitimacy of their conduct.

Universal contends that it has not been properly served with process and should not be a party to the action. However, Universal and Panasonic admitted that MUMS was formed as a joint venture. Joint ventures are governed by partnership law, and, like a partner, a member of a joint venture may be regarded as both a principal and an agent of the other co-venturers. *NLRB v. Sheet Metal Workers, International Ass'n.*, 154 F.3d 137, 143 fn 9 (3rd Cir. 1998); *United States v. USX Corp.*, 68 F.3d 811, 826 (3rd Cir. 1995); *Bachewicz v. American National Bank & Trust Co.*, 111 Ill.2d 444, 448, 95 Ill.Dec. 827, 490 N.E.2d 680 (1986); *Burtell v. First Charter Service Corp.*, 76 Ill.2d 427, 438, 31 Ill.Dec. 178,

394 N.E.2d 380 (1979); *Ambuul v. Swanson*, 162 Ill.App.3d 1065, 1070, 114 Ill.Dec. 272, 516 N.E.2d 427 (1987). As a general rule, joint ventures are governed by the same rules as partnerships. Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership*, pp. 450-455 (2d ed. 1990). In *Pyskaty v. Oyama*, 641 N.E.2d 552, 266 Ill.App.3d 801 (Ill.App. 1 Dist. 1994), *appeal denied*, 647 N.E.2d 1016, 159 Ill.2d 579, a summons in a medical malpractice action that was served on the physician, individually and in his capacity as agent for the medical partnership, was considered service of the medical partnership.

Here, the joint venture was properly served, so Universal as a member of the joint venture, was properly served. As a member of a joint venture, Universal can be found liable to third persons for wrongful acts of its co-venturers done in the course of the joint venture. *Tassan v. United Development Co.*, 88 Ill.App.3d, 581, 583, 43 Ill.Dec. 769, 410 N.E.2d 902 (1980); *Bakers Farmers Co. v. ASF Corp.*, 28 Ill.App.3d 393, 396, 328 N.E.2d 369 (1975); *Joseph W. O'Brien Co. v. Highland Lake Construction Co.*, 9 Ill.App.3d 408, 413, 292 N.E.2d 205 (1972).

CONCLUSION

Universal, Panasonic and MUMS entered into an improper scheme to evade the seniority provisions of the 1996 Universal cba in order to obtain state tax credits to which they were not entitled. This improper scheme intruded upon the employees' protected seniority rights, violating the National Labor Relations Act. Petitioners respectfully ask that their petition for writ of certiorari be granted.

Respectfully submitted,

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